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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOHN D. HUNTER, Plaintiff and Appellant, v. STATE OF CALIFORNIA, et al., Defendants and Respondents.	A154106 (Marin County Super. Ct. No. CV 1704515)

John D. Hunter appeals from the trial court's order denying his petition for relief from the requirements of the Government Claims Act (Govt. Code, § 810 et seq.).[1] We affirm.

BACKGROUND

Hunter claims he was exposed to Legionaires' disease in September 2015 while incarcerated at San Quentin State Prison. In or around late 2015, he filed a Government Claims Act claim about the incident. In February 2016, his claim was rejected.

In June 2016, Hunter filed a federal lawsuit alleging his exposure to Legionaires' disease constituted an Eighth Amendment violation. In February 2017, the district court dismissed his complaint, concluding it failed to state a claim under the Eighth Amendment. The order noted the allegations "may be enough" to support "a negligence claim in state court," and stated the dismissal was "without prejudice to re-filing in state

[1] All undesignated section references are to the Government Code.

court based on an alleged violation of state law." On November 1, 2017, the Ninth Circuit Court of Appeals affirmed the district court's dismissal. (*Hunter v. Davis* (9th Cir. 2017) 700 Fed.Appx. 728.)[2]

On November 21, 2017, Hunter filed another Government Claims Act claim about his exposure to Legionaires' disease. He also filed a request for leave to file a late claim. In December 2017, the Government Claims Program denied Hunter leave to file the 2017 claim.

After filing this 2017 claim, but before the Government Claims Program issued its denial, Hunter filed a personal injury lawsuit against the State of California, the California Department of Corrections, Ron Davis, Elaine Tootie, and Andy Crump (collectively, Defendants)—the same entities and individuals named in the 2017 claim. The complaint is not in the record on appeal, but all parties agree it is based, at least in part, on Hunter's alleged exposure to Legionaires' disease.

In February 2018, Hunter filed a motion for "judicial relief from the claim filing requirement" pursuant to sections 946.6 and 945.4. He argued his untimely filing of the 2017 claim was due to excusable neglect, to wit, that he did not learn of his claims against the state until he was able to obtain advice from an attorney. The trial court denied the motion, reasoning as follows: "Plaintiff presented his second claim and application to submit a late claim more than two years after his alleged injury. '...Filing a late-claim application within one year after the accrual of a cause of action is a jurisdictional prerequisite to a claim-relief petition. When the underlying application to file a late claim is filed more than one year after the accrual of the cause of action, the

[2] We grant Hunter's request for judicial notice of two records from his federal action: the docket report and notice of appeal. We deny the remainder of Hunter's multiple requests for judicial notice and also deny respondents' request for judicial notice because the requested documents either are already in the appellate record, are not relevant to our resolution of the appeal, or (as to one record discussed below) is not sufficiently authenticated to warrant judicial notice.

court is without jurisdiction to grant relief under Government Code section 946.6...' " This appeal followed.[3]

DISCUSSION

I. *The Government Claims Act*

"Suits for money or damages filed against a public entity are regulated by statutes contained in division 3.6 of the Government Code, commonly referred to as the Government Claims Act." (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 989.) " 'Claims for personal injury and property damage must be presented within six months after accrual; all other claims must be presented within a year. (§ 911.2.) "[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity and has been acted upon . . . or has been deemed to have been rejected . . . ." (§ 945.4.) "Thus, under these statutes, failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity." ' " (*Id.* at p. 990.)

"[I]f the injured party fails to file a timely claim, a written application may be made to the public entity for leave to present such claim. (. . . § 911.4, subd. (a).) If the public entity denies the application, . . . section 946.6 authorizes the injured party to petition the court for relief from the claim requirements. [¶] The court must grant the petition under . . . section 946.6, subdivision (c) if the claimant demonstrates by a preponderance of the evidence the application to the public entity under . . . section 911.4 was made within a reasonable time not exceeding one year after the accrual of the cause of action, and one of the other four requirements listed in . . . section 946.6, subdivision (c) is met." (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1777, fn. omitted (*Munoz*).) "Filing a late-claim application within one year after the accrual of a cause of action is a jurisdictional prerequisite to a claim-relief petition. [Citation.] When the

[3] Hunter proceeded in propia persona until after briefing on appeal was complete. He subsequently obtained the services of an attorney and was represented by counsel at oral argument.

underlying application to file a late claim is filed more than one year after the accrual of the cause of action, the court is without jurisdiction to grant relief under . . . section 946.6." (*Id.* at p. 1779.)[4]

II. *Analysis*

As an initial matter, we note that Hunter's section 946.6 motion sought relief from the timely claim requirement with respect to his 2017 claim only, and our review is limited to this issue. We express no opinion as to whether Hunter's lawsuit can proceed, in whole or in part, by virtue of his timely-filed 2015 claim.[5]

A section 946.6 petition may not be granted if the administrative application to file a late claim was made more than one year after the accrual of the cause of action. (*Munoz, supra,* 33 Cal.App.4th at p. 1779.) Hunter does not dispute that his cause of action accrued in September 2015, when he was allegedly exposed to Legionaires' disease. (See *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 906 [" 'Accrual of the cause of action for purposes of the government claims statute is the date of accrual that would pertain under the statute of limitations applicable to a dispute between private litigants.' "].) His application to file a late claim was made in November 2017, well over one year later.

Hunter contends that the period between June 2016 and November 2017, while his federal lawsuit was pending, should have been equitably tolled. " '[T]he equitable tolling

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[4] As Defendants note, "[a]n order denying a section 946.6 petition is an appealable order . . . ." (*DeVore v. Department of California Highway Patrol* (2013) 221 Cal.App.4th 454, 459.) Arguably, only an order denying a section 946.6 petition that was filed as a separate action, as contemplated by the statute (see § 946.6, subd. (a) ["The proper court for filing the petition is a superior court that would be a proper court for the trial of an action on the cause of action to which the claim relates."]), is appealable. In any event, if the order were nonappealable we would exercise our discretion to treat the appeal as a petition for writ of mandate. (*Quintanar v. County of Riverside* (2014) 230 Cal.App.4th 1226, 1232.)

[5] For this reason, we do not address Hunter's arguments that his state court lawsuit was timely filed based on his 2015 claim. We note that Hunter has a separate appeal pending from the trial court's order sustaining Defendants' demurrer (No. A55415).

of statutes of limitations is . . . . "designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied." [Citation.] . . . [¶] . . . [¶] Broadly speaking, the doctrine applies " '[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.' " ' " (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1106–1107.) We assume, without deciding, that equitable tolling can be applied to extend the time to file an administrative claim while a lawsuit is pending. (Cf. *id.* at p. 1110 ["We have found no decision in which the [equitable tolling] doctrine was applied . . . to extend the time for complying with an administrative deadline while the plaintiff pursued a judicial remedy."].)

Hunter has failed to establish at least one of the necessary elements for equitable tolling: timely notice to Defendants. "[I]n order to prove the applicability of the equitable tolling doctrine, a party must establish 'three elements: "timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." [Citations.]' [Citation.] ' " 'The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim.' " ' " (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 747.)

Although Hunter filed the federal lawsuit within one year of the accrual of his claim, he has not established that Defendants received notice of the lawsuit. The federal court's order dismissing Hunter's complaint states its review was pursuant to the preliminary screening provisions of 28 United States Code section 1915A, which provides: "The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." This provision "contemplates that screening is to take place before service of process on the defendant." (3 Mushlin, Rights of Prisoners (5th ed. 2018) § 17:42.) The docket report for Hunter's federal case does not show service of process was made. Hunter

points to docket entries showing proofs of service were attached to the district court's orders, but the docket entries alone do not show who was served with the orders. Moreover, the docket sheet does not show a counsel listing or address for any of the Defendants.[6]

Hunter points to evidence that the March 2017 notice of appeal in his federal case was served on defendant Ron Davis. Assuming this constitutes notice of Hunter's federal lawsuit as to Davis, such notice took place more than a year after the September 2015 accrual of Hunter's claim. Therefore, any equitable tolling effected by this service would not assist Hunter.

Hunter also relies on—and requests we take judicial notice of—a document he refers to as "the mail room prison log," which appears to be a printout from a computer record database. Even assuming such a document is judicially noticeable as an official act (Evid. Code, § 452, subd. (c)), Hunter offers no evidence this document is what he says it is and we therefore deny his request for judicial notice. In any event, the document lists only addresses and mailing dates, and does not identify the sender or what was mailed. Therefore, even if we took judicial notice of the document, it would be insufficient to establish notice.

Finally, Hunter relies on the federal court order dismissing his Eighth Amendment complaint "without prejudice to re-filing in state court based on an alleged violation of state law." Hunter suggests this language implies equitable tolling will apply. While the district court may have intended to limit the preclusive effect of its order, we do not read

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[6] At oral argument, Hunter argued Defendants nonetheless did have notice of his federal lawsuit in light of his 2015 claim; the federal preliminary screening provisions discussed above; Defendants' purported receipt of the federal district court's order granting Hunter's request to proceed in forma pauperis; and their ability to find his federal complaint on PACER, the federal court's public electronic records system. We note there is no evidence in the record that the in forma pauperis order was served on any or all Defendants, and we deny Hunter's request—made at oral argument—that we take judicial notice of the order. Even if we granted the request, we would decline to find such attenuated constructive notice is sufficient for purposes of equitable tolling (and Hunter provides no authority to the contrary).

the quoted language as indicating an intent to toll any state administrative claim requirements. The language of the federal court order has no bearing on the issue before us.

In sum, Hunter filed his application to file a late claim more than a year after accrual of the claim and he has not established an entitlement to equitable tolling. The trial court lacked jurisdiction to grant the requested relief. (*Munoz, supra,* 33 Cal.App.4th at p. 1779.)

DISPOSITION

The order is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BURNS, J.

(A154106)